5058

No. 5644

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC COIN LOCK COMPANY, A CORPORATION OF CALIFORNIA,
*Appellant,*

*v.*

COIN CONTROLLING LOCK COMPANY, A CORPORATION OF ARIZONA,

*Appellee.*

## APPELLEE'S BRIEF

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I.

The complaint and answer were broad enough in their scope, and the evidence sufficient to sustain the judgment of the court below. Pages 6 to 11.

II.

The court committed no error in finding against the appellant on its counterclaim. Pages 11 to 33.

III.

If error at all appears in the record it is against appellee on a proper interpretation of the contract. Pages 33 to 45.

IV.

The decision and judgment of the court below was right as shown by the record, and substantial justice was done. Page 33.

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*APPELLEE'S BRIEF*

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I.

## STATEMENT OF THE CASE

This is an action for a breach of the contract copied in full as an "Appendix" on the last pages of this brief.

There are so many errors and inaccuracies appearing in the statement of appellant's brief that we feel impelled to make a brief statement, as we cannot accept, in its entirety, the appellant's statement.

The Coin Controlling Lock Company, an Arizona Corporation, was the owner of certain letters patent for the manufacture of coin controlled locks used on the doors of toilets

and rest rooms. Said company was manufacturing its locks at Indianapolis, Indiana, and on February 23, 1915, the business of manufacture and using coin controlling locks was in its infancy, and the locks used had not attained a stage of perfection or we might even say to a state of fair efficiency. On the above date the Arizona Company entered into a written contract with one Charles Garrison of Los Angeles (Tr., p. 8), by the terms of which the plaintiff agreed to furnish Garrison one hundred locks per year to be by him used in the State of California. Garrison agreed to pay ten dollars per lock per year, payable in annual installments on January first and July first of each year.

Garrison was made the exclusive agent for the Arizona Company in the State of California for a period of one year, with the contract providing that it would be automatically renewed each year. (Tr., p. 9.)

The Arizona Company agreed to lease additional locks to Garrison for his exclusive use in said territory, subject to all the conditions and on the same terms as the 100 locks were leased, payable in the same manner. In consideration of Garrison being made the exclusive agent of the Arizona Company Garrison agreed to use due diligence in an effort to sub-lease said locks in the territory on sub-lease forms to be furnished by the Arizona Company, and agreed to immediately notify the Company of the exact location of each lock so installed and the name of the owner and to deliver to plaintiff a copy of the contract.

The contract provided that the sub-leases which Garrison was to secure was to be for locks of the Arizona Company (Tr., p. 10) and that upon the sub-letting of such locks on such leases "the same are hereby assigned to the company as a guarantee that the lessee will faithfully carry out and abide the terms of this contract." Lessee agreed not to use or maintain any other or different locks than those of the Arizona Company. The contract also provided, on violation

of any of the terms of the contract and on demand, Garrison should surrender to the company his lease title to the locks, but was not to remove them from the positions installed and that the lessee should surrender to the company all its interest in all sub-leases and locks leased thereunder and coins therein.

The Arizona Company guaranteed its locks as to material and workmanship, but not as to operation and agreed to keep them in repair except as to minor defect, and to replace, free of charge, any lock that was defective, provided the lock be returned to the company at its main office. The contract contained a provision for liquidated damages in the event of a violation of the terms thereof by the lessee, such liquidated damages being stated as the funds in the locks at the time of the violation.

The appellant company, the Pacific Coin Lock Company was organized under the laws of the State of California, Mr. Garrison being an incorporator and stockholder, and immediately, for value received, assigned his contract to the appellant and it immediately commenced operation thereunder. Later the contract was extended to cover the states of Texas, Washington and Oregon. The appellant proceeded to and did, pursuant to the terms of its contract, procure a great many sub-leases in which to use the appellee's locks, which subleases were on forms approved by the appellee. The appellant, however, did not assign said leases to appellee as provided in the contract.

All the sub-leases obtained were with the distinct understanding that the appellee's locks were to be installed and no other, although the sub-leases did not in specific terms make this provision. (Tr., pp. 51-52.)

During the years from the time of the execution of the contract to April 23, 1923, the appellee furnished appellant

a great many locks, but appellant did not install the locks in the same condition as furnished by appellee, but on the contrary undertook to work the locks over and change them without the consent of the appellee or without returning them to appellee for repairs. This was the source of much dissatisfaction in the use of the locks. Appellee was not at all times able to furnish as many locks as the appellant requested, due in part to shortage of labor and the difficulty of obtaining material during the war, and other reasons. Appellant understood this, but made no effort to have the contract terminated on this account. Probably due to the fact that the contract was proving extremely remunerative to appellant, for in the year 1922, as shown by the evidence (Tr., p. 177) the Pacific Coin Lock Company received net collections of $31,404.88 on 500 locks then in use. The appellant had the right, under this contract, to keep ten locks in storage without charge to be used when locks were required to be removed and sent to the home office for repairs. Appellant usually kept on hands a very much larger number than this without paying rental on them and desired to keep on hands 100 locks free, as charged in appellant's brief (Tr., p. 36), so that they could readily install them as soon as they obtained contracts.

The appellant sought to obtain a modification of the contract so as to procure one or more favorable terms (Tr., p. 212), and failing to do this the appellant on April 23, 1923 (Tr., pp. 64-65), repudiated its contract by refusing to receive locks from the appellee, and by removing appellee's locks and installing locks of another company on the premises covered by the sub-leases which were made for appellee's locks, the appellant at the time acting as the exclusive agent of the appellee in the State of California, and further by refusing to deliver to appellee the sub-leases as the terms of the contract required.

Appellant immediately upon such repudiation of the contract filed its bill in the U. S. District Court for the Southern

District of California, to enjoin appellant from removing its locks from the premises covered by the sub-leases taken on its behalf, and provided in its contract, and said cause was pursuant to the order of the court transferred to the law side of the court and the second amended complaint for breach of the contract was filed, to which the appellant filed an answer and counter-claim. (Tr., pp. 21-27.)

The appellant has, at great length, undertaken to state what Judge Bledsoe said and did with respect to the transfer, but this is entirely outside of the record, and, therefore, should receive no consideration. A search of the record shows nothing with respect to the case being transferred except a recitation in the amended complaint stating it was filed pursuant to the order of the court. A jury was impanelled to try the case, but later the parties filed a written stipulation waiving a jury and agreeing that the court should complete the trial of the case without a jury. The court rendered a memorandum decision (Tr., p. 657) and later findings-of-fact and conclusions of law and judgment, all as set out by the appellant in its brief.

## APPELLANT HAS NOT COMPLIED WITH RULE 24

It is doubtful if any question is raised for consideration by this court because of the failure of appellant to follow Rule 24 in the preparation of its brief. It has not followed the rules in the following particulars:

> (a) It has not presented, in the statement of its case, the questions involved and the manner in which they are raised. The complaint is not set out or abstracted, or the page of the record given where it may be found.
>
> (b) It has not stated in its specifications of error the specifications relied on, nor the degree in which they are alleged to be erroneous.

(c) It has not in "A brief of the argument" exhibited a clear statement of the points of law or fact to be discussed, *with reference to the pages of the record* and the authorities relied on to support each point.

(d) The brief on page 5 in its "Statement of the case," and all of pages 21, 22 and 23 of the argument contains much extraneous matter not appearing anywhere in the record.

(e) At no place in the "Statement of the Case" or in the "Specifications of Error" are any pages of the record cited.

This manner of preparation of the brief has entailed upon appellee's counsel and will require of the court considerable thumbing of the record in order to examine the parts to which reference is made, and makes it easy for appellant to insert matters not in the record.

Without waiving the appellant's error in not complying with the Rules of this Court, and without undertaking to supply all the defects in its brief, we shall undertake to answer the questions raised in its argument, in the same order and under the same headings.

## *ARGUMENT*

### APPELLANT'S SUB-DIVISION

### I.

The Amended Complaint Fails to Properly Allege Any Facts or Damages Upon Which the Court Would Have Been Justified in Giving its Judgment for the Rental Value of Locks Used by the Appellee.

1. What is said by appellant under this head on pages 21, 22 and 23 of its brief must be wholly disregarded for the reason that such matters are extraneous to the record, and the decisions cited thereunder can have no effect because

they are not related to any issue tendered by the record in this case. The so-called original bill and what ruling Judge Bledsoe made and what he may have said cannot be found in the record.

2. What appellant says on page 24 and the following pages of its brief, on the theory of the complaint, is difficult to follow inasmuch as it has not set out the complaint nor an abstract of it, nor given the page of the record where it may be found. We understand that this is a waiver of any assignment as to the complaint; the prayer of the complaint is found on page 25 of appellant's brief, which is self-planatory, three separate demands for damages for the breach of the contract *and a general prayer for relief.*

We agree with appellant that under 724 United States Judicial Code, the practice in the State Courts of California generally prevail, except where otherwise provided by Federal law. With this in mind, Section 850 of the California Code makes the prayer sufficient. Section 850 reads as follows:

1. 850 *California Judicial Code:*

   "The relief granted to the plaintiff if there is no answer, shall not exceed that which is demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issues."

2. *Rollins v. Forbes,* 10 Cal. 299:

   "If the specific relief asked cannot be granted, such relief as the case stated in the bill authorizes, may be had under the clause in the prayer for general relief, and in the absence of such clause, when an answer is filed."

   *Kans. v. Colorado,* 185 U. S. 125.

3. *Ginney v. Ginney,* 22 Cal. 633:

   "Where a defendant appears and answers the court

may, under Section 850 of the practice act, grant any relief consistent with the case made and embraced within the issue, although not specifically prayed for."

*Myers v. City of County of San Fran.*, 150 Calif. 131;
*Cummings v. Cummings*, 75 Cal. 434.

4. Jurisdiction to grant any particular relief depends not upon the prayer of the complaint but upon the issues made by the pleadings.

*Murphy v. Stelling*, 8 Cal. 702;
*Reinier v. Schroder*, 146 Cal. 411;
*Bedola v. Williams*, 15 Cal. App. 738;
*Moch v. Santa Rosa*, 126 Cal. 330.

According to the provisions of this California statute and the decisions of the courts of last resort of said state construing it; it follows that appellee's recovery was not limited to the prayer of its complaint, but could recover under any theory embraced within the issues, if there was a general prayer for relief. The burden is upon the appellant to show that the findings and judgment of the court below was outside the issues tendered by the pleadings. This it has signally failed to do. In fact it has not brought before this court either by quotation, or reference to the record, what the issues were, except that pages 24 and 25 of its brief in the argument it purports to copy (without reference to the record) a part of the complaint. That part copied shows a written contract referred to as "Exhibit A" was a part of the second amended complaint and that this contract formed the basis of appellee's cause of action, yet no effort is made by appellant to bring this contract or its contents before the court, or citing wherein the record it may be found, that the court might consider it along with the allegations of the complaint, and determine what was embraced within the issues. We insist that in the absence of any such showing this court must presume that the finding, conclusions of law and judgment of the court below was clearly within the issues.

3. Beginning on page 28 appellant in its brief under the same heading as the foregoing, discusses at some length the question of "Special Damages" and cites many authorities to show that special damages must be specially pleaded. We have no quarrel with appellant as to this being the law, but fail to see its pertinency here. Appellant's counsel is evidently confused as to what the court did in this case. On page 11 of appellant's brief, it shows the court found (Finding III) that appellee and one Garrison entered into a contract at Indianapolis for the rental of locks at a price named, this contract was afterwards assigned to appellant (Finding IV, Appellant's brief, page 12) that appellee shipped to appellant a large number of the locks. (Finding V, page 12.) That under the terms and conditions of the contract the appellant had the right to terminate it on December 31st of any year. (Finding VII, page 13, Appellant's brief.) That appellant gave notice on April 23, 1923, that it had terminated the contract, that it had in its possession at that time 604 locks chargeable to it at $5.00 each for the last six months. (Finding IX, page 13, Appellant's brief.)

In no sense of the term could this be said to be a finding of "special damages" it was a matter of damages flowing naturally and necessarily to appellee by the express language of his contract—a promise to pay rent which became due when he terminated the contract by breaking it, at the time and in the manner alleged, and when the court decided that plaintiff should not be allowed to recover the other damages claimed in its complaint, it had a perfect right under the law, and under the general prayer for relief to award such relief as the law and facts justified, to have done otherwise would have been a miscarriage of justice.

## APPELLANT'S SUB-DIVISION

## II.

### By Failing to Allege the Loss of the Rental Value of the Locks, Either as General or Special Damages, the Appellee Was Precluded from Introducing any Evidence as to the Loss of Rents from the Locks.

What we have said under heading I applies with equal force to and answers all the appellant has said hereunder.

Appellant does not deny that ample proof was adduced, but claims it was inadmissible because there was no allegation as damages for the rental of locks. Here again appellant is mistaken for on page four of its brief reference is made to such rental and to the contract. The allegations of the complaint are broad and expressly made the contract a part thereof (Tr., p. 14) and said contract expressly provided for rental of locks at $10.00 per year. (Tr., p. 8.) And the construction the lower court put upon the contract made exhibit 21 (Tr., p. 537) clearly admissible under the issues. The appellant is in no position to complain as to the construction placed upon the contract by the court, because the court adopted the theory urged by appellant itself. (See Appellant's answer, Tr., p. 24.) Where it is said: "This defendant avers that the only damages which the said plaintiff in any event would be entitled to recover would be the value of the locks not returned to it *and the rental value of the said locks while in its possession.*" (Our italics.) The appellant having tendered this issue it cannot be heard to complain if the court adopted its theory and held that it tendered an issue and heard evidence and made findings thereon, especially in view of the fact that appellee has accepted the finding and judgment.

## APPELLANT'S SUB-DIVISION

## III.

### The Court Erred in Giving Judgment for the Appellee and Should Have Given Judgment to Appellant on its Counterclaim.

The dual nature of this heading makes a rather broad subject and involves everything in the entire case, and not having been shown to be related to any particular assignment or specification of error makes it difficult to answer with any degree of brevity. We have attempted to analyze this discussion and find the appellant has chosen from a great mass of letters, telegrams, reports and other documents bearing date of the year 1920 and previous years (which was two years before the breach April 23, 1923) and supplemented their exhibits, remote in time from the alleged breach by the testimony of Mr. Hervey and Mr. Miller, the two stockholders of the appellant company and certain employees of appellant, and upon this showing alone are asking this court to determine that it was justification for the repudiation of the contract two years later. The lower court had before it other evidence more pertinent and more recent than this, and had the opportunity of observing Mr. Hervey and Mr. Miller while testifying, and had before it other exhibits at and quite near April 23, 1923, all of which showed the court had ample testimony upon which to base its findings.

It might here be pointed out that most of the letters and exhibits were merely self-serving declarations on the part of appellant's officers, and many of the exhibits were based wholly on hearsay, such as the report, being defendant's exhibit A-31 shown on page 60 of appellant's brief. (See Tr., p. 618.) Where Cosby testifies it was made up by what others told him. Being a trial by the court a great deal of latitude was accorded in the introduction of testimony, the

court being cognizant that in the last analysis, it would decline to consider incompetent or irrelevant testimony. Moreover, the witnesses whose testimony is set out by appellant are contradicted by other evidence and materially weakened on cross-examination reference to which is hereby made.

## FACTS TO WHICH APPELLANT MADE NO REFERENCE

That most of the trouble which appellant had to which reference is made in the various exhibits was due to interference with the locks. In a letter from the company dated February 23, 1923 (Tr., p. 326), the company said:

> "Seventy-five per cent of our trouble with your old style lock has been caused by patrons stuffing paper in the keepers."
>
> Again, Mr. Miller, the president, testified (Tr., p. 454): "We are also having a lot of trouble with malicious interference with the locks, such as taking off knobs and putting in sticks, etc." That was always true.
>
> That thieves caused a lot of trouble of which complaint was made.
>
> Tr., p. 294: "Yesterday at Long Beach we had seven locks robbed, all being gotten into by prying off the cash door."
>
> Tr., p. 301: "Yesterday one of the new locks installed was completely pried off the door and cash door taken. No doubt the making of a key to fit the stolen cash door will be attempted and shows the importance of having the cash keys made in series."
>
> Tr., p. 302: "Six locations equipped with latest model lock using Baird Cash key unlocked and robbed last night disproving Baird statement that key can-

not be duplicated. Unless robbers caught and keys recovered there will be no end of loss to all of us."

Tr., p. 303: "Locks operating with keys No. CA701 and 2025 being robbed daily. Have spent over two hundred dollars in past month for detective services without any results."

Tr., p. 309: "We stated in previous communications that keys have been duplicated and locks are being robbed * * *. We also have many locks that can be picked through coin slot, which must be replaced."

Again, Tr., p. 309: "We are sending you under separate cover one of the cash doors which was broken from the locks. This is done by hitting same with hammer or similar instrument breaking the ends of the door. The two case screws are then removed and cash doors taken and keys made to fit them. This has been done at various locations and a duplicate set of the new Yale cash keys have been duplicated and locks are being opened, money taken and cash doors put back into locks again.

The cash doors should be made of stronger metal as you will note the one we are returning to you is full of small holes and very easily broken. This morning when collecting at Long Beach, we found that every location had been robbed and cash doors put back into locks."

Tr., page 549: "Well we had a lot of robberies, and in cases there were cash doors taken off. * * * We blamed it to the sailors. They ripped off many locks, and we could not even find any of the parts to them. In one period of about two weeks we lost at least a dozen locks. We had trouble at Venice, a similar case, and one P. E. Station lock down at the beach, another P. E. Station at Long Beach, besides other repairs around town, at the Haywayd Hotel, Lankershim Hotel, the Rosslyn, and numbers of other places."

Tr., p. 548: Cosby, the general manager said: "I might say that at least 95 per cent of the complaints were minor complaints, such as paper being put in the

keeper, or a match in the slot, or a crooked slug, and at least 5 minutes after we got on the location this trouble was overcome."

Tr., p. 450: Mr. Miller: It is a fact that a large percentage of the trouble with this lock was due to tinkering with the locks, and robberies, and putting toothpicks in them, and stuffing paper in the locks, and people trying to get into them, or into the coin box. This is true of every coin lock built. You can't keep people from sticking gum, nails, files and everything into that little slot.

Surely the appellant would not contend that appellee was making any guarantee against such vandalism, and the fact that the locks were broken or picked or otherwise interfered with in any way constituted a breach of the contract, and we have the admission, as shown on February 3, 1923, which is near the date of the repudiation of the contract, showing that 75 per cent of the trouble was of this character.

The evidence shows that the appellant was not installing the locks as they were received from the factory, but were changing them and tinkering with them before they were installed.

Tr., p. 452: Mr. Miller: We did not install these locks as they were sent to us, on two or three occasions I demanded that they be installed exactly as sent, but as a general rule we worked them over. I knew they were being worked over by our men before they were installed. I knew they were not using the keepers sent with these locks. We made a keeper of our own. I was informed of that at the time they began using the other keepers. I left the matter of the conduct of the business largely up to the boys installing the locks and doing the collecting and looking after the trouble. Mr. VanCleave called my attention to it.

Tr., p. 453: I told them hereafter I wanted them installed exactly as they sent them. This was in 1922.

"I wrote Mr. VanCleave we were going to do that. I wrote him that I had been trusting it to others to look after the mechanical end of the business. I said your letter convinced me that it has not been done as it should be. I meant that at the time—in 1922. I told him I was greatly surprised to learn that they were using those keepers." Afterwards I wrote Mr. Vancleave about it. (Tr., p. 454.) In the letter I admitted Mr. Vancleave knew more about it than my men.

Tr., p. 634: Mr. VanCleave: The appellee company made objection to this as early as August, 1922. (Tr., p. 634.) Letter from Mr. VanCleave saying: "Now Garrison, you gentlemen are absolutely wrong about this keeper situation and you cannot make me believe that it isn't 75 per cent of all your trouble. I make the statement without any qualification whatever, that your business is positively the only place that we have any complaints and I do wish we could get you to co-operate with us, for I tell you this has cost us and is costing us a lot of money."

That the locks were not of the kind as represented by appellant but were reasonably satisfactory is shown by the record (Tr., p. 428) as shown by a letter from one of the largest users, namely, The Pacific Electric Company, from which we quote:

"It is with pleasure that we state that your (Tr., p. 429) service has improved from year to year and at the present time we have nothing but words of praise for it.

I am very happy to call attention to the fact that in addition to the income which we receive and the fact that your locks serve a class of our discriminating patrons, there is another valuable asset to us in this, etc."

And in a letter from Mr. Miller, July 26, 1921, Tr. R., p. 449, he says:

> "I am advised that the last locks you sent us seem to be working very well mechanically."
>
> In February, 1920, he said (Tr., p. 445): "Mr. Garrison has written you a letter making all of the suggestions concerning improvements on the new lock. All I have to say is that it is a wonderful improvement over anything that has been put out in the shape of a coin lock. I am almost ready to say it is perfect, but I know better than that. Nothing every stands still. Next year you will have a lock that will be an improvement over this very good one that you have assembled now."

Tr., p. 627: Donald C. Morgan, an engineer of 15 years' experience in adjusting, manufacturing and patenting coin locks testified that he was familiar with appellee's locks and they were as good as any lock on the market at the time. In fact the Hervey locks which were installed in lieu of appellee's locks brought the same complaints as those made against appellee's. (Tr., pp. 625-626). Men were locked in toilets with the Hervey locks. (Testified to by Mr. Keith, one of the employees and not disputed.)

The record disputes the fact that appellant did not have locks on hand, shown by the testimony of Mr. H. J. Cosby, who was in fact general manager of the company. (Tr., p. 550.)

> "There was times we had plenty of locks, more than we needed, and may have been times when we were a little short as I recall, a week or so."

And in a letter of August 23, 1922, appellant admits it had locks on hands but desired a different style of lock. This changing of the style of lock is the cause of most of the demand for locks as shown by the telegrams and letters to which appellant refers.

Then, again, appellant had a practice of ordering locks

that were not needed, which is not according to the terms of the contract, but shows that they wanted them on hands to install immediately after they procured a contract. We take it that a failure to fill such orders would not be a breach of the contract. Mr. D. L. Cosby on page 599, who was in charge of the books so testified: Well we ordered some locks, more locks than we needed at times. Our purpose in doing that was to have extra locks on hands, anticipating new business, that we might be able to fill the contracts for any new business.

Again, on page 606 of transcript, Mr. Banister, one of the agents at San Francisco urged the company to not merely order locks for contracts which they had but to *get more than that.*

Again on page 636 of transcript Mr. Miller, president, stated he wanted to be able to install the locks immediately and ordered one hundred locks for which he had no contracts. This was not according to the contract.

As proof that the locks were suitable for the purposes for which they were manufactured is shown by the undisputed testimony in the record as to their ability to meet competition.

Mr. Miller in a written statement of May 19, 1922, transcript, pp. 463-467, both inclusive, in part says:

> "The protection to the coin lock business must be by rendering service and alert business efficiency rather than relying on patent rights. That has been the system of Pacific Coin Lock Company, and we will stack up the dividend paying power of its 500 locks against any other 500 locks in the country." (Tr., p. 465.)

And on page 464 of the transcript he states that the net earnings for the company for the previous year was $32,000.

This rather indicates that appellant was using fairly good locks. H. J. Cosby who was former general manager of the appellant company who quit the company January 1, 1923, and went in business for himself using other makes of locks, but had little success and who began using the locks of appellee after April 23, 1923 (Tr., pp. 531-532) secured appellant's locations with the locks that they discarded (Tr., p. 534; Tr., p. 548). Mr. Cosby says that during the time he was with the Pacific Company using the locks about which complaint is now made, the Pacific Company had practically all the locks in Los Angeles. There were only two or three other lock companies who has locks in use there. He said (Tr., p. 550):

> "I do not know of any new contracts being lost in Los Angeles territory because of the failure of the manufacturer to send us locks."

And in a letter from the appellant company on November 4, 1922, Mr. Crews, speaking for the company says (Tr., p. 597):

> "We have not yet heard from Mr. Liddon, but when we do we believe he will find that it is not so easy to sell locks in our territory, as he expects. For the last three months we have been canvassing our customers very thoroughly and the *majority of them are with us to stay*. He might sell a few small locations. However, we will keep you advised and if we need any assistance will call on you.
>
> We are not surprised that Mr. Heald was feeling peevish when he returned, as we succeeded in spiking his guns in the northwest. We lost only one location to him and that location took in $8.00 per month on four locks. We expect to get that one back within six months, as we have been already advised that their locks were out of order within two weeks after being installed."

Mr. Miller sought to make it appear that lock locations were lost because of the failure to get locks, and the insufficiency of such locks, but in letters which he wrote to the company this is disproved.

> Tr., pp. 432-438, in which he says (on the latter page): "The only two concerns in the business that know the most about it and are run by capable and successful business men are your own company and that of the American Coin Lock Company of Pawtucket, R. I."

This was in 1921, and it appears that Mr. Miller had a rather exhalted opinion of appellee company at that time. In the same letter, Tr., p. 440, he states that all the good locations are going to buy their locks outright unless somebody stops it. And in which he speaks of the Rice Hotel and the Gunter Hotel in Texas doing this. (In his testimony Mr. Miller had stated that these two hotels were lost because he could not get good locks.)

Reference is also again made to this. (Tr., p. 556.)

Some items of evidence appear (Tr., pp. 641-642) where it is shown that the appellee company although not bound to do so under their contract, furnished free of charge to appellant locks in lieu of those broken by thieves and vandals amounting to a considerable number.

There are many other items of evidence of this character and of general character showing in many respects the position taken by the appellant in its brief, pages 38 to 45, is not tenable, but it would extend this brief to an unwarranted extent to undertake to cover all of them.

There is just one more point to which we desire to make reference, and that is the cause of cancellation and we will do this briefly.

The record shows that Mr. Hervey purchased a one-third interest in the appellant company a few days previous to April 23, 1923 (Tr., p. 65). Mr. Hervey, it will not be disputed, was the manager of the General Service Lock Company and the appellant contracted with this company for locks to be used in lieu of the appellees. (Tr., p. 64.) During the preceding six months there is nothing in the record to show that any particular complaint was being made of the service which the appellant was receiving from the appellee. (Tr., p. 66.) Shows a long letter from Mr. VanCleave written on April 17, in which he was planning to go to the Pacific Coast to meet Mr. Miller with reference to enlarging the lock business, and on April 14th, had sent Mr. Miller additional new equipment for his use. The telegram on page 65 shows that Mr. Miller suddenly changed his mind with respect to the proposed trip of Mr. VanCleave and the telegram in transcript, page 64, shows the reason for this—in fact they had arranged to take the Hervey locks. Is it not natural to assume that when Mr. Hervey became a third owner he induced the company to repudiate its contracts with the appellee so that his locks could be used instead, and the claim now made that they had trouble with the locks in 1920 and prior thereto as shown by the evidence brought forward is only a subterfuge. Yet Mr. Miller admits (Tr., p. 457) that he had locks on hand but did not know how many. They had evidently already ordered some of the Hervey locks before sending the telegram as shown (Tr., p. 458). And again, at page 439, in a letter written in 1921, Mr. Miller said he wanted to get the Pawtucket lock because it was "literally foolproof."

On May 19, 1922, in a letter to Mr. VanCleave (Tr., pp. 463-467 inclusive) he specifically asks a cancellation of the contract—this no doubt was done in an effort to relieve the Pacific Coin Lock Company from damages in the event of a breach.

It is clearly apparent from the record in this case that in

1915, when the contract between the parties was made, the lock business was in its experimental stage, and like all other types of machinery and equipment had to be tried out before any degree of mechanical perfection could be reached. All parties must have understood this situation and contracted with respect to this. The contract itself contains no warranty of operation, but simply as to material and workmanship. The parties had in mind the particular type of lock which was then being made by the appellee company the contract provided that in the event of improvements being made that the appellant should have the benefit of such improvements. The whole record shows that appellee did, from time to time, make changes in the mechanism all with the consent of the appellant, and all appeared to be working harmoniously to improve the lock, the appellant making criticisms learned from actual observation and the appellee accepting them in the spirit in which they were offered, and in good faith undertaking to correct the evils. Most of the appellant's complaints on the furnishing of the locks was not due to the number, but they insisted on having a different type and appellant seemed committed to the idea that it was the duty of the appellee to procure a lock that could not be broken with a hammer, pried open with a screw-driver or susceptible to attack of vandals. The court judicially knows that such was not within the contemplation of the parties at the time of making the contract, and that locks on banks, safety deposit vaults were daily being broken by ingenuous thieves and burglars who have ways of getting into a cash drawer. And the business of the locksmith has not yet reached such a state of perfection that locks cannot be picked and doors opened by the designing and criminally inclined class.

In discussing the subject it must be borne in mind that the locks which appellee in its contract agreed to furnish was the model manufactured in 1915 under certain of its letters patent, and it was this design of lock that appellee warranted as to material and workmanship. It appears that appellee

got out several new and different design of locks, as shown by the record. (Tr., pp. 297, 273, 240, 225, 223, 220.) In fact practically all the correspondence, set out in appellant's brief, in which objection was made to the locks, appears to be in the year 1920, and the early part of 1921 when appellee was, with the consent and at the request of the appellant shipping locks not covered by the contract.

> "If machines manufactured under a contract depart from the specifications with the knowledge and consent of the purchaser, he cannot hold the manufacturer responsible in damages for their failure to work."
>
> *J. Thompson Mfg. Co. v. Grenderson*, 49 L. R. A. 859, 106 Wis. 449;
>
> *Bostwick v. Mut. Life Ins. Co.*, 67 L. R. A. 705 (Annotated).

Paragraph 8 of the contract (Tr., p 11) gives appellant the right to use "new devices" under the same terms and conditions which are operative with other similar representatives in other states and territories.

If it can be said that the warranty of "Material and workmanship provided in paragraph 11 of the contract can be extended by implication to these new designs of lock which we doubt from the above authority it cannot be implied that they were to be proof against robbing and picking by thugs and thieves, but this is just what appellant expected. After the experimental stage of the 1920 lock was worked out, which was two years before the breach April 23, 1923, the record shows very few complaints as to the character of the locks. The chief trouble as the court found was in the delay of deliveries at times. The cause of delay in furnishing the locks in the year 1922 was due to appellee going into a merger with other lock companies, by the terms of which but one style of lock made by another company on a large production basis was to be used, and which caused appellee to cease making locks for a time, as this was due to the earnest solicitation of ap-

pellant it cannot claim damages as a result thereof. (Letter of Miller, Tr., p 198, and Tr., pp. 639-647.)

## THE APPELLANT CANNOT RECOVER ON ITS COUNTERCLAIM.

1. Where manufactured articles are sold or let to a promisee under a contract of warranty, such articles are to be delivered from time to time and the promisee finds they are not as warranted he has two remedies—he may refuse to accept the articles and rescind the contract, or he may accept them and rely on an action for damages for breach, but he must elect with promptness which remedy he will pursue—he cannot pursue both.

*Wallace v. Clark,* 21 A. L. R. 385;
*Norrington v. Wright,* 115 U. S. 188.

2. The strict performance of a contract may always be waived and it is a general rule that whatever is not demanded is waived.

*Ruling Case Law,* Vol. 6, 990;
*Robertson v. Smith,* 11 Tex. 211;
*VanIderstine v. Barnet Lumber Co.,* 242 N. Y. 245.

3. ,Therefore, assuming, without admitting, that the locks were not as contracted for, the acceptance and use of the same, and paying rental on them for a period of seven years without any effort of rescission is a waiver of strict performance and estops the defendant from now asserting the locks were defective.

*Bostwick v. Mut. L. Ins. Co.,* 116 Wis. 392, 67 L. R. A. 705;
*The Copely Iron Co. v. Pope,* 108 N. Y. 232;
*Northfield Natl. Bank v. Arndt,* 12 L. R. A. 82.

When the contract was made coin controlling locks were in

their experimental stage and in process of development. All parties realized this and contracted with this in mind. The evidence of Vancleave, Cosby boys and Morgan all showed this fact, and showed further that the locks furnished by plaintiff were as good in material and workmanship, and operated as good or better than any other coin locks being used over the country at the time, and much superior to the other locks being used on the Pacific coast.

4. As heretofore stated no notice was given on January 1, 1923 to cancel the contract but the defendant continued to order locks, received and accepted them and make new contracts for locations of plaintiff's locks after the first of the year. In other words, it elected to continue the contract for another year. Mr. Miller had written Mr. Vancleave to come to California to talk over the business and plan for the future (Vancleave, Tr., p. 14). Mr. Vancleave had hurried his new model of lock to him for inspection and criticism. Both parties were evidently planning for a continuance of the contract which had been in effect for seven years, and suddenly something happened. What was it? The evidence shows nothing unusual except the appearance of Mr. Hervey, and, is it not fair to assume, that as soon as Mr. Hervey became interested in the company he wanted his locks used, or that he made the use of his locks a condition precedent to his going in the company?

## THE APPELLANT WAS NOT JUSTIFIED IN REPUDIATING ITS CONTRACT ON APRIL 23, 1923.

1. On the trial the defendant claimed it had a right to terminate the contract on April 23, 1923, because of certain alleged breaches on the part of the plaintiff, namely, that the plaintiff did not furnish to it the kind and quality of locks specified in the contract, and secondly, that it did not ship them promptly. The defendant undertook to show that the locks were not of the kind and quality as provided by the terms

of the contract, because the locks would get jammed at times, so that they would lock patrons in the toilets, and at other times would not operate at all, and that the locks were defective in workmanship and material.

2. We desire, at the very beginning of this discussion, to call the court's attention to the fact that the contract carries with it an *express warranty* as tɔ workmanship and material. There is no express warranty that the locks will work perfectly at all times. There was no *implied* warranty with respect to the quality of the locks, because it is a well known rule of law that where a written contract carries with it an express warranty, it excludes all implied warranties, it being conclusively presumed that the parties embodied in their contract the warranty with which they desired to bind themselves, and in this respect went as far as they desired to go. Many cases might be cited on this proposition, but we think the decision of Mr. Justice LaMar on this rule is sufficient:

> "There are numerous well considered cases that an express warranty as to quality excludes any implied warranty that the articles sold were merchantible or fit for their intended use."

> *DeWitt v. Berry,* 134 U. S. 306;
> *Osborn v. Nicholson,* 13 Wall, U. S. 654 (and cases cited in those two decisions).

3. The express warranty found in the contract is paragraph four and is as follows:

> "(4) The company guarantees its locks as to material and workmanship and agrees to keep them in proper repair, except as to minor defects, and repair or replace free of charge any lock that is defective, *provided that the lock* be returned to the Company at its main office."

4. It will be observed that this warranty has a condition annexed to it. According to the express condition of the war-

ranty, which provisions and warranty were accepted, it is provided that minor defects and repairs are excepted from the warranty and the conditions of the warranty is that the company will "*replace free of charge any lock that is defective, provided that the lock be returned to the company at its main office.*"

In other words, the return of the locks to the plaintiff's main office was a condition precedent to which the defendant was bound to conform before it could claim anything by virtue of the warranty. We assume that this proposition is too well known to require even the citation of authority.

There is no evidence that the plaintiff did not comply with its express warranty in that it refused to replace any locks that were returned as defective or to repair them; there is even no pretense that the defendant ever returned any locks to the plaintiff which it refused to repair. Mr. VanCleave testified that his company had at all times either repaired or furnished new locks for any locks that the defendant returned which were claimed to be defective, and even replaced some which Mr. VanCleave says were not defective, simply because the defendant asserted they were. (Tr., p. 641.) There is no denial or contradiction of this evidence of Mr. VanCleave, so it stands as the record evidence in the case upon this proposition.

5. We think it is a well known rule of law that when machinery, or any patent article is sold under an express warranty even that it will do the work for which it is manufactured (which is not the case here), and a machine is furnished as a completed manufactured article, and the purchaser does not use it in such completed state but changes it in some respects or adds something to it which was not intended by the maker to be used, he is in no position to rely upon the warranty. In other words there is an implied contract upon his part in consideration of a warranty to use the machine as it

is furnished and his failure to do so would be such a breach of such implied warranty as would amount to a waiver of the express warranty—that is by his own conduct he would be estopped from claiming anything under the warranty.

*Larson v. Aulburn, etc.*, 39 Am. St. Rep. 893-9.

6. Attention is called to the fact that this is an Indiana contract and the courts of the State where this contract was executed have construed the law with respect to provision in contracts for the return of machines if not as warranted; it being held that a failure to return such machines and the continued possession and use thereof, after knowledge of defects, is a waiver of the warranty and renders the purchaser liable for the contract price of the machine.

*Burke v. Keystone Mfg. Co.*, 19 Ind. App. 556, and cases cited.

7. Merely writing the seller that the machine sold under such a warranty is not doing satisfactory work, and it is held subject to the order of the seller, is not such a return of the machine as complies with the contract.

*Dickey v. Winston Cigarette Co.*, 117 Ga. 131.

8. A warranty as to the capacity of a mill must be taken to be applicable to the mill when operated under favorable circumstances and conditions.

*Fink v. Tank,* 76 Am. Dec. 737, 12 Wis. 276.

9. The express warranty provides if there be any defects of workmanship or material other than minor adjustments that the lock shall be returned to the chief office at Indianapolis. That the defendant thought he could tinker on the locks and improve them, or that he thought it necessary to do additional work on them, or that it felt that the exigencies of its business did not give them time for such return, furnishes no legal excuse why this provision of the contract should not be fulfilled.

## APPELLANT HAS PROVEN NO DAMAGES AND OFFERED NO COMPETENT OR SUFFICIENT EVIDENCE THEREOF.

1. In the first place it withdrew from the consideration of the court all alleged damages with respect to failure to get locks on time, stating frankly to the court that this sort of damages would enter into realms of speculation.

The defendant introduced in evidence a statement which the defendant's witnesses testified was a correct copy of a record showing the expenditures paid out for help outside the City of Los Angeles. (Tr., p 501.) From an examination of the witnesses it appeared, however, with respect to this exhibit that it included not only money paid out to labor in repairing and fixing locks, but also the amount paid out for the collection of money from the boxes and installing locks and doing all work necessary to represent the defendant. All this was over objection. (See Tr., p. 516, and following pages.) Mr. Newby informed the court before the ruling that he would follow this and show what was properly charged to the account. No other evidence was offered by him on this subject.

So, as the record now stands there is simply this evidence, the opinion of Crews, as to the amount of money expended by this company for salaries of men employed outside of Los Angeles. It appears from the testimony of D. L. Cosby (Tr., p. 600) that he kept the original books of the company of which Exhibit No. 12 purports to be a transcript. That in said books there was no segregation of the amount paid to men for repairs, hence the exhibit as it now stands in the record shows the total amount expended by the company for salaries of its employees in places outside the City of Los Angeles. Mr. H. J. Cosby testified that these men installed locks, made incidental repairs, and collected the nickels from the locks and sent them to the company. In other words they were the

representatives of the Pacific Coin Lock Company in these other cities. Surely it will not be contended by the defendant that the plaintiff should pay the men who represented them in these localities, soliciting new business for defendant and making collection of the nickels and settling with the hotels and the owners of the buildings where the locations were. The sums paid out on these matters were deducted as an expense account before the $32,000 net income for the years were made. We therefore assert, that this exhibit showing the total expenditures for salaries outside the City of Los Angeles does not and could not measure any damages to the defendant for work done on locks in making them as warranted, especially in the light of the contract which expressly provides that if the locks are defective in workmanship or material, that they shall be returned to the company at Indianapolis, Indiana, for repairs. The contract expressly also provides for any minor repairs to be made they shall be made by the defendant itself, and that was one of the obligations it assumed under the terms of its contract and for which it could not predicate damages against the plaintiff in this action.

It is true, of course, that Mr. Crews, who was an accountant in the office of the company and who claimed in his testimony to know but little about the lock business testified that it was necessary to keep a trouble shooter on the ground in the locations other than Los Angeles, but he merely stated his own conclusions and backed up by no testimony of any kind or character, so that his opinion could not be considered as testimony sufficient to warrant the court in holding that the expenditures made as shown by the exhibit were for necessary repairs made to the locks due to defects in material and workmanship. The contract requires the defendant to make minor repairs. Mr. Crews based his judgment that it would not have been necessary to keep men on salaries in cities outside of Los Angeles by what he claimed was the custom of other lock companies. The plaintiff could not be bound by the testimony of other lock companies in this respect, for other lock

companies, doubtless have different contracts for their customers.

2. The general measure of damages for a breach of warranty is the difference between the value of the article actually furnished and the value it would have had, had it possessed the warranted qualifications.

*Willison*, Vol. III, Sec. 1391.

3. The measure of damages for defect in cotton compressing machine purchased to use the ensuing year, is the rental value for the year.

*Livermore, etc., v. Union Com.*, 53 L. R. A. 482.

4. The measure of damages for a breach of warranty of machinery not wholly worthless is the difference between the value of the property installed and its value as a warranted.

*Hauss v. Surran*, 168 Ky. 686, L. R. A. 1916D, 997.

5. The locks which the defendant received were admittedly not wholly worthless because it used them and made a large profit, the most, we assert, the defendant could claim for a breach of warranty would be the difference between what *it did make on said locks and what he would have made if they had been as warranted.* This could perhaps have been arrived at by evidence, by the making of proof of the rental value of the locks, if they had been as defendant claimed they should. There is no competent evidence in the record as to the defendant's damage, and even if it should be entitled to recover, which we strenuously deny, it would have to be as nominal damages.

*English v. Spokane Com. Co.*, 57 Fed. 451.

## APPELLANT'S SUB-DIVISION.

## IV.

### The Appellant Was Clearly Justified in Declaring the Contract Cancelled on April 23, 1923, Etc.

As heretofore pointed out in discussing Subdivision III that it covers the *entire case* and just why this additional subhead is made is not exactly clear. In discussing III we have answered about all the points raised under this division and any extended argument on the same subject matter here, would be only a work of supererogation, however, we do wish to point out that the testimony set out thereunder with respect to the profits appellant would have made, etc., are only mere conclusions not predicated on any facts in the case. There are numerous errors of facts alleged to have been proven which will be noted in comparing the record, which time and space forbid us to set out in detail.

## APPELLANT'S SUB-DIVISION.

## V.

### Defects In Findings.

1. The appellant is in error in assuming that the finding of court must be in harmony with the California Statutes by reason of the Conformity Act. This is regulated by U. S. C. Title 28, Par. 773, which provides that

> "The finding of the court upon the facts may be either general or special." It is within the discretion of the court in which way he shall find such facts.

*Bank of Waterproof v. Fidelity and Deposit Co.*, 299 Fed. 480.

Since it is discretionary with the court as to how it may find the facts, it is not error if it finds such facts generally and not specially—if it makes a general finding it is enough that sufficient facts are found to sustain the judgment. There is no pretense that the lower court undertook to make a special finding of facts on all the issues involved—neither is this required by U. S. Code, but appellant has treated the subject as though a special finding of facts had been requested and made by the court. The court in its order does not denominate them *special finding* of facts. (See Tr., p. 34.)

Of course it would be admitted if the court undertook to make a special finding of facts on the issue involved it would be required to find all the pertinent facts shown by the evidence and embraced within the issues.

2. Most of the criticisms as to the court's findings are highly technical and several deal with the question as to whether they were within the issues, or sustained by the evidence. The latter propositions have been covered in other parts of the brief and will receive no further consideration here.

3. As to whether certain findings are findings of fact or "conclusions" sometimes require much subtle and refined reasoning. The appellant has answered its own argument on page 120 of its brief which we here quote with approval:

> "It is in many cases difficult to distinguish between findings of fact and conclusions of law; the ultimate facts are not in all cases found only from direct evidence, but are to a great extent presumed from the existence of other facts, or arrived at by an inferential process, in which the evidentiary facts become the premises and the ultimate fact the conclusion. In most cases the question is determined by a consideration of the means by which the result is obtained. If, it is said, from the evidence, the result can be reached by that process of reasoning adopted in the investigation

of truth, it becomes an ultimate fact, to be found as such. If, on the other hand, resort must be had to the artificial processes of the law in order to reach a final determination, the result is a conclusion of law. Any *doubt* as to the category in which the result reached by the court belongs is to be *resolved in favor of the judgment.*"

## THE JUDGMENT WAS MORE FAVORABLE TO THE DEFENDANT THAN IT WAS ENTITLED UNDER THE LAW AND FACTS, HENCE THERE SHOULD BE NO REVERSAL.

The U. S. Judicial Code provides in effect that on the hearing of any appeal the court shall give judgment after an examination of the entire record, without regard to technical errors or defects which do not affect the substantial rights of the parties.

*U. S. Judicial Code,* Title 28, Sec. 391;
(Judicial Code 269 as amended.)

Section 398 provides that where review of judgments is sought by appeal or writ of error, the Appellate Court shall have full power to render such judgment on the record as law and justice may require.

Section 875, Title 28, Judicial Code, provides that no judgment, etc., shall be reversed for any defect or want of form, but shall proceed to give judgment according to the rights of the cause in law shall appear, etc.

With these salutory statutory provisions in mind we wish to show if we may, that the judgment in the court below was quite favorable to appellant, in fact, much more favorable than he was entitled by a consideration of the entire record, that appellee was entitled to judgment in addition to what it received, by virtue of the express language of the contract, to the value of all the sub-lease locations, and by reason of appellant

violating its contract and keeping such locations, that appellee was justly entitled to damages for what such locations were worth which in 1922 earned $32,000.00 net. It is true, appellee has not assigned cross-errors as it had the right to do, but if it chose to accept a lesser amount than it was entitled under the law, rather than have continued litigation, it insists that this court should consider its rights in determining whether *substantial justice* has been done to appellant, with this in mind and for this purpose alone we wish to present to this court the argument we made in the court below on the construction of the contract which forms the basis of appellee's action and the proper measure of damages, and we maintain that the only error committed in the lower court was against appellee for which appellant cannot complain.

## MEASURE OF DAMAGES.

(1) A decision of this question involves an interpretation of the contract. At the trial the plaintiff contended that upon a breach of the contract the plaintiff was entitled to all lock locations, and the locks thereon and coins therein. That the contract by express terms gave this; that this was the intention of the parties and that the defendant had breached its contract in not assigning said lock leases to plaintiff, and that by keeping said locations the plaintiff's damages should be measured by the value of such location, or what they reasonably might be expected to net the holder during the life of the respective location leases. The defendant contended, as we understood, that it had the right to cancel the contract at any time, and all the plaintiff could demand was the rental for the six months' period and the return of the locks, and on the other hand, the court indicated that the rental value ($10.00) per year of the locks during the remainder of the life of the respective lease contracts might be found to be the measure of damage in the event the plaintiff was entitled to recover.

In the interpretation of a contract all its provisions should be considered, the situation of the parties, and the purposes they had in mind, as gleaned from the contract, considered as a whole, and as to the several parts; every word and every provision should be given weight and effect, unless they contravene some rule of law.

(2) The contract is peculiarly an agency contract; paragraph 2 of the contract gives the defendant "The exclusive agency for the State of California." If the plaintiff should make any contracts for the use of locks in the defendant's territory they shall inure to its benefit "during the life of this contract." (Contract, paragraph 2.) The contract provides, paragraph 3, "Lessee agrees to use diligence in an effort to sublease *said locks* in said territory * * * which sub-leases shall be on terms and contract form to be furnished by the company."

Paragraph 5 provides:

> "All sub-leases which the lessee shall secure, covering the sub-letting of said locks shall thereupon and thereby, and the same are hereby assigned to the company as a guarantee that the Lessee will faithfully carry out and abide by the terms of this contract."

It will be noted that the sub-leases to be taken, are for "*said locks.*" It therefore follows that if the subleases are taken pursuant to the terms of the contract they were subleases for *plaintiff's locks*, and none other, and on a termination of the contract would be of no value except to plaintiff or some one handling its locks.

Paragraph 6 of the contract provides: "Lessee shall also forfeit and surrender to the company all interest in all subleases and locks leased thereunder and coins therein."

We maintain it was clearly the intention of the parties from a consideration of the above and other parts of the con-

tract considered as a whole, that defendant as a part consideration for its being given the exclusive agency of the State of California and the locks let on a small per annum basis, that the defendant should obtain the lease contracts for *plaintiff's locks*. Plaintiff would have had no interest in defendant securing lease contracts upon which defendant *could use locks other than plaintiff's*. This is why plaintiff obligated the defendant to use diligence in an effort "to sublease said locks in said territory," and to take the leases on forms furnished by it. It was unquestionably the intention of the parties that the lease locations should be for the *plaintiff's locks*. The defendant realized this and for the most part furnished the plaintiff copies of its subleases, each of which as shown by the evidence is for plaintiff's locks and none other.

Therefore, the subleases being for plaintiff's locks it was but natural that the contract should provide as it does in paragraph six that in the event plaintiff should declare the contract cancelled for default of defendant that defendant should "*surrender* to the company all interest in all subleases, etc." Not particularly as a matter of compensation as for a breach of the contract but because the lease locations were to go with the locks, having been taken exclusively for these locks. This provision being one of the obligations the defendant had assumed, the surrender of such locations would have followed a termination of the contract for any cause. Suppose, for instance, the contract had been cancelled on January 1, 1923, as the defendant had a right to do, what would then have become of these lease contracts made for the plaintiff's locks. They presumably had value only for *plaintiff's locks*. Would they not under a fair and reasonable interpretation have gone to plaintiff under the surrender clause in paragraph 6? Suppose again that these lease contracts taken for plaintiff's locks at the time of the breach were practically worthless, paying only about $5.00 per year, would not the defendant have tendered an assignment of all of them to plaintiff and asserted that the plaintiff was not damaged inasmuch as it had trans-

ferred to plaintiff all the contract called for, and all that was in contemplation of the parties, and defendant could have justified its position by the express language of the contracts and by the adjudicated cases.

(3) A further study of this contract since the trial has convinced us that one of the binding obligations of the defendant within the contemplation of the parties was, that upon a breach or *termination* of this contract all subleases should go to plaintiff and since there has been a breach in not assigning them on demand this is as much a breach of its obligation as its refusal to keep the locks, and the measure of plaintiff's damages for this particular breach is the value of said leases or the loss of profits that plaintiff could have made had the contract in this respect been performed. The defendant has erroneously treated these locations as though it had a contract giving it the exclusive right to install *any* kind of lock it chose, but the contract provided it was to use due diligence to get "subleases for said locks" (the plaintiff's locks) and the evidence discloses that said subleases expressly provide that they shall install "coin controlling locks which are now under its control," meaning plaintiff's locks.

(4) The parties have a right to stipulate the measure of damages when drawing the contract, and it will be enforceable if otherwise legal.

> *Monument Pottery Co. v. Imp. Coal Co.*, 2nd Series Fed. Vol. 21, p. 683;
>
> *Monroe v. Hicks*, 144 Mich. 30, 107 N. W. 719.

(5) Parties may stipulate the consequences of a breach of the terms of their contract, or provide the extent of their liability and the court will hold them to the contract.

*Ancrum v. Conder Water Co.*, 21 L. R. A. (N. S.) 1029-1033.

There is no inhibition in the law against parties making an agreement disposing of personal property where such provision does not amount to a penalty, which public policy denounces, but we respectfully insist that the provisions of paragraph 7 do not call for a penalty, but are simply some of the obligations assumed and agreed to by defendant in consideration of its exclusive agency and privilege conferred upon it whereby it could, for a nominal investment, enter a business which would and did prove to be exceedingly lucrative.

> "Where parties agree upon a rule of damages to be followed in case of a breach of an agreement, it will be enforced."

*Twin City Creamery Co. v. Godfrey*, 176 Mich. 109, 50 L. R. A. (N. S.) 807.

(6) Damages recoverable on a breach of a contract are such as may reasonably be considered as arising naturally from the breach itself, or such as may reasonably be supposed to have been in contemplation of the parties when they wrote the contract.

*Hunt v. Oregon Pac. Ry.*, 36 Fed. 481;
*Taylor Mfg. Company v. Hatcher Mfg. Co.*, 39( Fed. 440;

*Wilcox v. Richmond, etc., Ry. Co.*, 52 Fed. 264;
*Wells v. Natl. Life Ins. Co.*, 99 Fed. 222;

*Globe Refining Co. v. Landa Oil Co.*, 190 U. S. 540.

(7) The second paragraph of the contract provides that the lock rental shall be fixed per annum, payable however on the first days of January and July of each year, and that the succeeding payments shall be made annually thereafter. The

contract also provides that it is to continue in existence so long as the rentals are paid as herein specified. The third paragraph of the contract provides that it shall be automatically renewed from year to year on terms and conditions herein specified. It is therefore clearly apparent that the parties understood and agreed that the contract between them should be an annual affair and when renewed should be renewed for another year, and should therefore continue from year to year so long as rentals are paid. It follows, we think, that a failure to pay rentals at the beginning of any one year would amount to a cancellation of the contract. It would be a default in the payment, the effect of which would be to terminate the contract, which was seemingly within the contemplation of the parties. The latter part of paragraph seven provides in express language the following: "But the failure of the company to demand or take possession of said locks on account of any *default,* shall not estop it from afterwards taking possession of said locks on account of any subsequent default." We maintain that by the use of the word "default" as provided in paragraph seven that a failure to pay rental according to the terms of the contract would be such a default as would cancel the contract at the option of the plaintiff.

Paragraph seven provides that upon such default the lessee shall forfeit and *surrender* to the company all leases, and sub-leases and locks leased thereunder and coins therein. We, therefore, conclude that it is but fair to assume that the parties were undertaking to reach an agreement as to what should happen in the event of the cancellation of the contract which of course could be done by default in the payment of rent. It is true that the language is not quite as clear and as explicit as we would have it, but this is the only paragraph of the contract which seems to indicate anything with respect as to what the parties had in mind in the event of a cancellation of the contract at the end of any particular year. It follows, therefore, that if, upon a cancellation of the contract,

that sub-leases and locks thereon should go to the plaintiff that the same results should follow in the case of a breach which terminated the contract. We cannot see that it makes any difference how the contract was terminated whether by a breach of the defendant by repudiation and failure to carry on or whether by failure or default to make the annual payments of rental. The situation after the contract was terminated would be the same in any event, and the question with which we are dealing, is, what was to become of the subleases? It cannot be said with any degree of reason that the parties contemplated that in the event of termination or breach that the locks of the plaintiff could be taken off the location and shipped back to the plaintiff, and that the defendant should hold the location and install thereon other locks. This would do violence to every part and the whole of the contract, and this theory, we assert, cannot be sustained from any language of the contract. Considering the contract in individual parts which deal with the question of location, or considering it as a whole, all the sub-leases were to go to the plaintiff.

Referring here to the language of Justice Holmes in *Globe Refining Co. v. Landa Oil Refining Co., supra,* in which he says it is true if people when in contracting "contemplate performance not a breach, they commonly say little or nothing as to what shall happen in the latter event, and the common rule has been worked out by common sense which establishes what the parties would have said if they had spoken about the matter." Here the parties have spoken in clear, distinct, and definite language; have contemplated the effect of a breach and what was to be done with the subject matter of the contract in the event of a breach occurring. They made a binding contract and acted upon the terms thereof for a period of seven years. It is true, the evidence shows, the president of the company says it was a hard bargain, or that the contract was too strong, but they executed it nevertheless, and acted under it. The contract was made by men

of sound minds, not acting under any duress, and is, in our opinion, in all respects valid and binding.

Mr. Justice Holmes expressed the rule very forcibly in the case of *Globe Refining Company v. Landa Cotton Oil Company, supra,* as follows:

> "When a man makes a contract, he incurs, by force of the law, a liability to damages, unless a certain promised event comes to pass. But, unlike *the* case of torts, as the contract is, by mutual consent, the parties themselves, expressly by implication, fix the rule by which the damages are to be measured."
>
> And again:
>
> "It is true that, as people when contracting contemplate performance, not breach, they commonly say little or nothing as to what shall happen in the latter event, and the common rules have been worked out by common sense, which has established what the parties probably would have said if they had spoken about the matter. But a man can never be absolutely certain of performing any contract when the time of performance arrives, and in many cases, he obviously is taking the risk of an event which is wholly, or to an appreciable extent, beyond his control. The extent of liability in such cases is likely to be within his contemplation and whether it is or not should be worked out on terms which it fairly may be presumed he would have assented to if they had been presented to his mind."

In the case at bar the parties themselves did have in mind and did contemplate what might happen upon a breach of the contract, and did, by express terms of the contract, clearly set out in what manner, at least a portion of the damages should be measured. In other words the parties by the express terms of the contract have agreed on what disposition should be made of the subject matter about which they have contracted. The parties by their own agreement

fixed and determined in their language what should be done with the lock upon a breach of the contract, and they likewise, by the same agreement, and in the same language fixed and determined what should become of the lock locations *upon such* breach, namely, that the locks were to stay on the location and both locks and locations be delivered to the plaintiff upon demand.

Again in the *Globe Refining Company v. Landa Oil Company, supra,* Justice Holmes says:

> "The consequences must be contemplated at the time of the making of the contract. The question arises then, what is sufficient to show that the consequences were in contemplation of the parties, in the sense of the vender taking the risk? It has been held that it may be proved by oral evidence when the contract is in writing. 'It may be asked with great deference, whether the mere fact of such consequences being communicated to the other party will be sufficient, without going to show that he was told that he would be answerable for them and consented to undertake such a liability."

In the case from which we have been quoting the plaintiff was undertaking to hold the defendant for certain damages growing out of the breach of a contract, claiming that such damages were the natural consequences and result of the breach, and were such damages as might have been in contemplation of the parties at the time of making the contract, namely, that the plaintiff would, of necessity, have to go to the expense of sending tank cars a long distance in order to receive the oil contracted for, and the plaintiff further claimed that the defendant had notice that such cars would have to be transported such distance, but the court disposed of this question as indicated by the above quotation by saying that mere notice was not sufficient, but it must be apparent that the liability to be incurred was clearly within

the contemplation of the parties at the time the contract was made.

The question of the sub-leases was not only within the contemplation of the parties, but likewise was the subject of an express provision, and it was therefore well understood by both parties that upon a breach of the contract that these locations and locks should go to the plaintiff.

In *Wells v. National Life Association*, 99 Federal 229, the court quoted from the case of *Dennis v. Maxfield*, 10 Allen 138, as follows:

> "These earnings or profits were therefore within the direct contemplation of the parties when the contract was entered into. They are undoubtedly in their nature contingent and speculative and difficult of ascertainment, but, being made by express agreement of the parties of the essence of the contract, we do not see how they can be excluded in ascertaining the compensation to which the plaintiff is entitled, etc."

The claim was made in that case that the measure of damages was speculative and inadequate, and that it did not constitute a safe basis on which to rest a claim for indemnity. The court said:

> "The answer is that in such cases the parties having by their contract adopted a contingent, uncertain and speculative measure of damages, must abide by it, and courts and juries must approximate as near as possible to the truth in endeavoring to ascertain the amount which the party may be entitled to recover on such a contract in the event of a breach."

And in *Wells v. National Life Association*, the court also quoted from *Wakeman v. Manufacturing Co.*, 101 N. Y. 205, among other things as follows:

> "Most contracts are entered into with the view to future profits, and such profits are in the contem-

plation of the parties, and, so far as they can be properly proved, they may form the measure of damages. As they are prospective they must be to some extent uncertain and problematical, and yet, on that account a person complaining of a breach of contract is not to be deprived of all remedy. It is usually his right to prove the nature of his contract, the circumstances surrounding and following its breach and the consequences naturally and plainly traceable to it; and then it is for the jury, under proper instructions as to the rules of damages, to determine the compensation to be awarded for the breach. When a contract is repudiated, the compensation of the party complaining of its repudiation should be the value of the contract. He has been deprived of his contract, and he should have in lieu thereof its value, to be ascertained by the rules of law which have been laid down for the guidance of courts and jurors."

We earnestly maintain that under the contract the locks and locations should have been turned over to plaintiff, and the failure to do so entitled the plaintiff to what such locations would have earned during the life of such sub-leases. The evidence shows that this was $32,000 per year for the year 1921, and the court suggested when an offer was made to prove the earnings for the year 1922, that if the court should conclude that the plaintiff was entitled to recover such profits, the case would be opened and the defendant directed to supply such evidence. The average life the contracts outstanding at the time of the breach of the same is two and one-half years, and at $32,000.00 per year, would have earned net to the plaintiff the gross sum of $95,000.00.

8. Should the court, however, conclude that a fair interpretation of the contract would not give to the plaintiff the lock location, then we maintain that the measure of plaintiff's damages should be the rental of locks contracted for during the life of the several sub-lease contracts, and these is strong authority for this contention as shown by the following:

"It is the general purpose of the law, and should be, to give *compensation*; that is, to put the plaintiff in as good a position as he would have been had the defendant kept his contract."

*Williston on Contracts,* Vol. III, Sec. 1338.

"Compensation should not be for the value of the contract, but the value of *performance* of the contract, it is performance that the parties are entitled to."

*Williston on Contracts,* Section 1339.

We maintain that we have answered all and, even more of the specifications of error that are properly presented in appellant's brief. It has been quite difficult in analyzing its brief to know definitely to just what "specification of error" some of its argument was intended to apply.

For any illogical arrangement in the assembling of the argument we desire to pass the blame to appellant because we have tried to follow its order of presenting the subjects.

We insist that no error appears from the record and that the decision and judgment of the court below were clearly right on the record and that substantial justice has been done appellant, and that this cause be in all things affirmed.

Respectfully submitted,

CLYDE H. JONES,
D. M. PATRICK,
*Attorneys for Appellee*

1314 Merchants Bank Bldg.,
Indianapolis, Indiana.

"EXHIBIT A"

Indianapolis, Ind., February 23, 1915.

THIS CONTRACT between COIN CONTROLLING LOCK COMPANY, a corporation with its main offices at Indianapolis, Indiana, designated as "COMPANY" and CHARLES C. GARRISON, of Los Angeles, California, designated as "LESSEE," WITNESSETH:

(1) In consideration of the payment of an annual rental of ten ($10.00) per lock, payable as follows: Five hundred ($500.00) dollars payable January 1st, 1915, and five hundred ($500.00) dollars July 1st, 1915, or within sixty days from said dates by grace and annually thereafter, the Company hereby leases to the Lessee, for a period as long as rentals are paid as herein specified, one hundred (100) Coin Controlled Locks owned by it, and covered by sundry United States and foreign Letters Patent, for exclusive use in the following territory and none other, to-wit:

THE EXCLUSIVE AGENCY FOR THE STATE OF CALIFORNIA.

(2) It is further understood and agreed that any and all Coin Locks that may be contracted for use by the parent Company or its agents nor or in the future in the State of California will inure to the benefit of the said Lessee during the life of this contract, which is automatically renewable from year to year, on terms and conditions herein specified.

(3) The Company agrees to lease additional locks to the said Lessee for his exclusive use in said territory and subject to all the terms hereof, as needed, rental for which shall be payable at the times as above specified, viz., January 1st and July 1st of each year following date of shipment, rentals to be computed proportionately from the first day of the month following date of shipment. Lessee agrees to use diligence in an effort to sub-lease said locks in said territory for use in hotels, railroad stations and other public places, which sub-leases which shall be on terms and contract forms to be furnished by the Company, and shall immediately notify the Company of the exact location of each lock so installed,

and the name of the owner or lessee of the building, where installed, and shall furnish the Company a copy of the contract under which it is installed. He shall notify the Company of all renewals, removals and locations of the locks and is granted the further privilege of maintaining ten (10) additional locks without charge for repairing and replacements.

(4) The Company guarantees its locks as to material and workmanship and agrees to keep them in proper repair, except as to minor defects and repair or replace free of charge any lock that is defective, provided that the Lock be returned to the Company at its main office.

(5) All sub-leases which the Lessee shall secure, covering the sub-letting of said locks shall thereupon and thereby, and the same are hereby assigned to the Company as a guarantee that the Lessee will faithfully carry out and abide by the terms of this contract.

(6) On violation of any of the terms hereof, and on demand therefor, Lessee shall surrender to the Company his lease title to said locks, but he is not to remove them from position as already installed, without the written consent of the Company, and all locks in possession of Lessee that are not installed to be delivered to the Home Office of the Company. All locks to be in as good condition as when received by Lessee, except natural depreciation, wear and tear; Lessee shall also forfeit and surrender to the Company all interest in all sub-leases and locks leased thereunder and coins therein, but the failure of the Company to demand or take possession of said locks on account of any default shall not stop it from afterwards taking possession of said locks on account of any such subsequent default.

(7) The title to said locks, and all parts thereof, shall remain at all times in the Company, and the Lessee shall not convey or encumber the same, or use or maintain toilet locks or other Coin Controlled Locks other than those of the Company, without the written consent of the Company.

(8) It is hereby further fully understood and agreed that the Company will grant the Lessee the privilege of first refusal to operate exclusively in the State of California any and all new device or devices which it may acquire by owner-

ship or lease, now or in the future and under the same terms and conditions which are operative with other similar representatives in other states and territories.

(9) Violation of any of the terms hereof shall thereby work a forfeiture of this contract, and any and all funds then in or thereafter deposited in any and all locks secured under this contract shall be and remain the absolute property of the Company, not as a penalty, but as liquidated damages suffered by it for such violation of this contract.

(10) IN TESTIMONY WHEREOF the Coin Controlling Lock Company has caused this contract to be executed by its proper officer, and the Lessee has hereunto set his hand and seal, all in duplicate this 23d day of February, 1915.

COIN CONTROLLING LOCK COMPANY,

*By* FRANK R. MALSBURY, *Secretary-Treasurer.*

CHARLES C. GARRISON, *Lessee.* (SEAL)

Witness to signature of Charles C. Garrison,

C. E. Miller, 608 Grosse Bldg., Los Angeles, Cal.

## EXHIBIT A-1

## ASSIGNMENT OF CONTRACT

Los Angeles, California, February, 1915.

For and in consideration of three thousand ($3,000.00) dollars, the receipt of which is hereby acknowledge, and other valuable considerations, I, the undersigned, Charles C. Garrison of Los Angeles, California, hereby assign, sell and transfer all of my rights, title and interest in a certain contract under date of February 23, 1915, by and between the Coin Controlling Lock Co. of Indianapolis (a corporation) and the undersigned, Charles C. Garrison to Pacific Coin Lock Company (a corporation) of Los Angeles, California.

CHARLES C. GARRISON.

CONSENT

For and in consideration of the execution of a new contract by and between Charles C. Garrison, of Los Angeles, California, and the Coin Controlling Lock Company, of Indianapolis, Indiana, said contract bearing date as of February 23, 1915, and taking effect as of January 1, 1915, by mutual consent, and three thousand ($3,000.00) dollars cash to be paid by said Garrison on or before March 15, 1915, to said Coin Controlling Lock Company, which is in full payment of all accounts to said Company up to Juanary 1, 1915, hereby gives its consent to the execution of the above assignment on the conditions recited herein.

COIN CONTROLLING LOCK COMPANY,

(SEAL) *By* FRANK R. MALSBURY, *Secretary-Treasurer.*"